IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

| | | |
|---|---|---|
| IN RE: | ) | Chapter 7 Case |
| | ) | Number 95-11368 |
| HELEN CLARE JOHNSON | ) | |
| | ) | FILED |
| Debtor | ) | 2002 JAN 11 P 4:07 |
| | ) | |

**ORDER**

The Court, on its own motion, ordered the Debtor to appear and show cause why the Debtor's chapter 7 discharge in case number 95-11368 should not be revoked because she was ineligible to receive the discharge under 11 U.S.C. §727(a)(8).[1] Because the chapter 7 discharge granted on December 15, 1997 has been in effect for four years and because other parties may have relied on this discharge, the discharge granted in chapter 7 case number 95-11368 shall not be revoked.

The Court has jurisdiction to hear this matter as a core

[1]11 U.S.C. §727(a)(8) reads in pertinent part:

(a) The court shall grant the debtor a discharge, unless–

8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition...

bankruptcy proceeding under 28 U.S.C. § 157(b)(2)(J) & (O) and 28 U.S.C. § 1334. This motion is brought by the Court sua sponte under 11 U.S.C. §105(a)[2] and Federal Rule of Civil Procedure 60(b) (applicable to bankruptcy practice under Federal Rule of Bankruptcy Procedure 9024).[3]

---

[2]11 U.S.C. §105(a) reads in pertinent part:

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

[3]FRCP 60(b) reads in pertinent part:
On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. §§ 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

The facts are as follows. On March 15, 1991, the Debtor filed chapter 7 case number 91-10502 and was granted a discharge on June 21, 1991. The Debtor subsequently filed case number 95-11368 on August 18, 1995 as a chapter 13 case which case was converted to chapter 7 on August 26, 1997 and discharged on December 15, 1997. Even though the Debtor was ineligible for discharge under 11 U.S.C. § 727(a)(8), no party in interest objected to or filed a complaint seeking to deny the Debtor her discharge.

On November 21, 2000, the Debtor filed a second chapter 13 petition, case number 00-13223, which is currently pending before this Court. On July 12, 2001, I entered an order sua sponte reopening chapter 7 case number 95-11368 and directed the Debtor to appear and show cause why the discharge entered in this case should not be revoked because it was commenced within six years of the filing date of chapter 7 case number 91-10502. After hearing I directed the debtor to submit proposed findings of fact and conclusions of law establishing why the discharge should stand.

The issue is whether this Court can and should revoke the discharge granted to the Debtor in violation of 11 U.S.C. §727(a)(8). As a matter of law, the court can revoke this discharge but under the facts of this case it should not. A debtor cannot receive a chapter 7 discharge if he had been granted

a previous chapter 7 discharge "in a case commenced within six years before the date of filing of the petition." 11 U.S.C. §727(a)(8). When a chapter 7 discharge is granted for a case converted from a chapter 13 petition, the filing date of the original chapter 13 case is used to calculate the beginning of the six year period, and not the date of conversion. 11 U.S.C. §348(a)[4]; In re Burrell, 148 B.R. 820, 822 (Bankr. E.D. Va. 1992). The Debtor's first chapter 7 discharge was filed on March 13, 1991; the second chapter 7 discharge, granted December 15, 1997, was originally filed as a chapter 13 petition on August 18, 1995. This second chapter 7 discharge was improperly issued. See, 11 U.S.C. §727(a)(8) at note 1.

Bankruptcy courts have the inherent power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code and may take any "action or mak[e] any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." 11 U.S.C. §105(a). Federal Rule of Civil Procedure

---

[4]11 U.S.C. §348(a) reads in pertinent part:

(a) Conversion of a case from a case under one chapter of this title to a case under another chapter of this title constitutes an order for relief under the chapter to which the case is converted, but, except as provided in subsections (b) and (c) of this section [which have no application here], does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief.

60(b) allows the court to "relieve a party...from a final judgment, order, or proceeding for...(6) any other reason justifying relief from the operation of the judgement." Federal Rule of Civil Procedure 60(b) (incorporated by Bankruptcy Rule of Civil Procedure 9024). The Court sua sponte may bring its own motion under Bankruptcy Rule 9024. In re Cisneros, 994 F.2d 1462, 1466 (9th Cir. 1993)(court sua sponte revoked chapter 13 discharge granted because of mistake). The purpose of 11 U.S.C. § 727(a)(8), and its predecessor, Section 14(c)(5) of the Bankruptcy Act, is to prevent the use of Chapter 7 to avoid frequent honest debt. Perry v. Commerce Loan Co., 383 U.S. 392, 399, 86 S.Ct. 852, 856-57 (1966).

The Debtor argues that the Court cannot sua sponte revoke a discharge except on the grounds outlined in 11 U.S.C. §727(d). Her argument relies on In re Canganelli, which held that a bankruptcy court cannot sua sponte object to a debtor's discharge that violates 11 U.S.C. §727(a)(8). Canganelli v. Lake County Indiana Dept. of Public Welfare (In re Canganell), 132 B.R. 369, 384 (Bankr. N.D. Ind. 1991). In Canganelli, the Debtor filed for chapter 13 bankruptcy five years and one day after the filing of his previous chapter 7 petition; this chapter 13 petition was subsequently converted to chapter 7. Id. at 374. One of the debtor's creditors objected to the pending discharge because violated 11 U.S.C. §727(a)(8). Id. at 375. The court

held that the creditor did not timely file its objection to discharge because it did so outside the 60 day time limit proscribed by Bankruptcy Rule 4004. Id. at 383. The court further held that a bankruptcy court cannot sua sponte object to a debtor's discharge because only the trustee, creditor, or the United Trustee has a right to object under 11 U.S.C. §727(c). Id. at 384. According to the Canganelli court, 11 U.S.C. §105(a) cannot be used to enforce "sua sponte the substantive rights which otherwise belong to the creditors, the trustee or the United States." Id. Even if the court could sua sponte move to deny discharge, it was limited to the 60 day time period to which a party may object to discharge under Federal Rule of Bankruptcy Procedure 4004. Id. The Debtor also cites In re Johnson, which follows the Canganelli holding with regards to denying discharge under 11 U.S.C. §727(a)(8). Johnson v. Chester Housing Authority (In re Johnson), 250 B.R. 521, 526-27 (Bankr. E. D. Penn. 2000)(court refused to revoke wrongfully granted discharge because it was not obtained fraudulently under 11 U.S.C. §727(d)).

I respectfully disagree with the Canganelli and Johnson holdings. 11 U.S.C. §727(a) lists the eligibility requirements that a debtor must meet to receive a chapter 7 discharge. The Supreme Court has stated that "[t]he unmistakeable purpose of the six-year provision was to prevent the creation of a class of habitual bankrupts - debtors who might repeatedly

escape their obligations as frequently as they chose by going through repeated bankruptcies." Perry v. Commerce Loan Co., 383 U.S. 392, 399, 86 S.Ct. 852, 856-57 (1966). The bankruptcy court, pursuant to 11 U.S.C. §105(a), has the inherent power to enforce these eligibility requirements to prevent an "abuse of process." In re Burrell, 148 B.R. 820, 823 (Bankr. E.D. Va. 1992)(bankruptcy court sua sponte denied debtor discharge to avoid abuse of process). The Debtor should never have received a chapter 7 discharge as she failed to meet the eligibility requirements of 11 U.S.C. §727(a)(8). Thus this Court may use 11 U.S.C. §105(a) to revoke the discharge in order properly to enforce the eligibility requirements for debtor relief.

In this case I will not revoke the discharge, however. Federal Rule of Civil Procedure 60(b) states that a motion to relieve a party from an order must "be made within a reasonable time." While the court has the power to "reconsider, modify or vacate...previous orders," it should do so only "so long as no intervening rights have become vested in reliance on the orders." Meyer v. Lenox (In re Lenox), 902 F.2d 737, 740 (9th Cir. 1990). Furthermore, "vacating a valid, void, or voidable order of discharge without notice to interested parties, is not something to be done perfunctorily." In re Ali, 219 B.R. 653, 655 (Bankr. E.D. N.Y. 1998). More than four years have passed since the December 15, 1997 chapter 7 discharge during which time

intervening creditors may have extended credit to the Debtor in the belief she would not be eligible for chapter 7 relief for another six years and that she was free of the legal obligation to pay those previously discharged debts. If this discharge were revoked the Debtor could convert her present chapter 13 case to chapter 7 or at least be required to include the previously discharged debts in her current plan to the detriment of her current creditors.

I thus decline to revoke the Debtor's discharge because too much time has passed since the discharge was granted with the resulting detrimental impact the revocation would have on intervening creditors.

JOHN S. DALIS
CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 11TH Day of January, 2002.